United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7021

In The

United States Court of Appeals

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No. 76-7021

Frederic P. Wiedersum Associates,
Plaintiff-Appellee,

—against—

National Homes Construction Corporation,
Defendant-Appellant.

On Appeal From the United States District Court for the Eastern District of New York

REPLY BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Plaintiff's answering brief does not deal with essential issues on this appeal. Rather, with bluster and obfuscation, plaintiff treats the case as if plaintiff did not have access to the trial record.

A. Timeliness.

It is conceded that the timeliness of the submission of final plans was very much at issue at trial, in that the final plans were required to be in National's hands at least six

days prior to the submission date of April 6, 1973 (Br. 4, 13-14).* Plaintiff claims that it satisfied the timeliness requirement by supplying National with one set of plans on March 30, 1973 which were identical to the final plans which arrived on April 5, one day prior to the submission date. At no point in its brief does plaintiff advance the contention (for indeed it could not) that the extensive changes that were incorporated in the April 5 plans were irrelevant to the question of whether plaintiff made a timely submission of final plans to National. Yet, the record shows that John Gleason, National's chief witness, was precluded time and time again from testifying that the changes between the March 31 and April 5 plans were so massive as to prevent the March 30 plans from being considered as "final plans" in any sense of the word, despite the fact that William Laverty and Albert Voorneveld, two of plaintiff's witnesses, had testified that the changes between the March 30 and April 5 plans were extremely minor and had no effect on National's ability to complete its final pricing. Indeed, plaintiff has the effrontery to argue on this appeal (Br. 30) that the changes were minor, despite the fact that a central issue on this appeal is that Gleason had been precluded from showing otherwise. Such evidence of differences between the two sets of plans had nothing whatsoever to do with whether the April 5 plans were inadequate, a matter which the Court erroneously ruled was an unpleaded affirmative defense of failure of consideration.

B. National's Effort to Put in a Bid.

At no point does plaintiff contend that in a breach of contract action (especially one in which it is claimed that the defendant "inexplicably" failed to perform (Br. 4)) it is irrelevant or improper for defendant to show to the jury

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* Parenthetical references which include the notation "Br." are to pages of plaintiff's answering brief. Parenthetical references "Nat. Br." are to pages of National's principal brief on this appeal. Other parenthetical references are to the Joint Appendix.

the efforts that it was making to perform what was claimed to be its contractual duty. Yet, the record clearly shows that Michael Bolka, one of National's witnesses, was precluded from testifying about the efforts that National was making to obtain commitments from subcontractors in South Carolina in order to finalize a bid for the South Carolina project. (Nat. Br. 16) Again, the evidence excluded in no way related to the adequacy of the April 5 plans. Yet, it was also swept under the canopy of the Court's otherwise erroneous ruling that the inadequacy of the April 5 plans related to failure of consideration.

C. National's Motion for Summary Judgment.

It is not disputed that National moved for summary judgment on the principal ground that it had not received any plans from plaintiff prior to April 5. National did so because, (1) prior to John Gleason's agreement to come to New York to review the facts and to testify at trial, National believed, on the basis of the recollection of Duley, Payne and Bolka, that it had not received any earlier plans, and (2) prior to William Laverty's conveniently regaining his memory, his deposition testimony had been that, while he may have sent plans to National on March 30 (247), he really did not know what it was that he had sent at that time. (247-248)

John Gleason testified at trial that he saw the March 30 plans early in the week of April 2, 1973. However, he also testified that he left National with extremely hard feelings and had previously refused to aid National in defending any litigation. (555-556) It was only after Mr. Laverty remembered that he did in fact send the March 30 plans to National and National's motion for summary judgment was denied that Mr. Gleason agreed to come to New York, although he had been asked to do so on numerous prior occasions. (557; 559-560) He arrived in New York and discussed the case with National's attorneys in detail for the first time on the day prior to commencement of the trial.

(487; 556-557) Neither side had taken Gleason's deposition. The substance of Gleason's trial testimony was set forth in National's trial memorandum served on plaintiff before the commencement of the trial. Plaintiff was not prejudiced by Gleason's arrival and does not argue that it was. All plaintiff's witnesses who could rebut Gleason's testimony were in the courtroom and testified.

The fact that National made a motion for summary judgment and lost can have no effect on whether the Court erred in excluding evidence that plaintiff incorporated extensive changes into the April 5 plans or whether National was obligated to assert as an affirmative defense the failure of plaintiff to do something (prepare plans conforming to the specifications of the Navy) that plaintiff alleged in the complaint that it was obligated to do, and which defendant in its answer had denied plaintiff did do. Clearly, plaintiff seeks with its repeated references to the motion for summary judgment to create a smoke screen behind which to hide the errors committed at trial. National knows of no rule (and plaintiff cites none) requiring a party to continue to pursue at trial a theory put forward in good faith on a motion for summary judgment which was denied, especially when new evidence becomes available in the interim.

Rather than addressing squarely the issues on this appeal, plaintiff dwells at length on National's motion for summary judgment and proclaims that the evidence established "beyond doubt" (Br. 10) that National breached its alleged contractual commitment to plaintiff. Other prejudicial errors such as (1) the failure of the Court to allow the admissions in the complaint to be shown to the jury, (2) the Court's failure to inform counsel of its charge prior to summation as required by Rule 51, (3) the Court's totally irreconcilable charge, and (4) the error in charging that plaintiff could recover on a theory of promissory estoppel, are claimed by plaintiff to be "relatively insignificant" and hardly worthy of mention. (Br. 6) It is hard to

imagine what plaintiff would consider to be an error of consequence.

ARGUMENT

I.

The Court's Exclusion of Evidence Cannot be Justified as Relating to Adequacy of the Plans.

The key issue at trial was the timeliness of the submission of final plans to National. The complaint alleged "that final plans" were sent to National on or about April 4. These plans were sent to National under a cover letter dated April 4, which did not go out until April 5, the day before the submission date (231-233; 100-101), and are referred to in National's principal brief as the April 5 plans. Since plaintiff's own witnesses concede that they knew National needed final plans at least six days prior to April 6 (255), the issue of timeliness could not be more clearly drawn.

Plaintiff sought to show that timely submission of final plans had been made to National by introducing the March 30 plans and testifying that they had been sent to National to enable it to do the work required for final pricing. What possible other purpose could there have been for introducing the March 30 plans if not to show the timeliness of the submission. Mr. Laverty read from an internal memo that he prepared stating that the March 30 plans were sent to National to give it the six days that it needed in order to complete its pricing work. (222-223)

The prime issue was whether the March 30 plans could be considered "final plans" in satisfaction of plaintiff's burden of timeliness. There is no dispute over what constituted final plans. Final plans were those that contained all of the changes that were to be made relating to the work that had to be done by the contractor. (412) There could be no later revisions because the final plans were to

be submitted to the subcontractors who would base their bids on them. Plaintiff knew that the final plans were to be relied upon by subcontractors. (311-312) At no point has plaintiff even suggested that significant changes could be made in a set of plans once they had been submitted to National as final. On the contrary, that was the entire purpose of the testimony from Messrs. Laverty and Voorneveld that the changes made in the March 30 plans were insignificant. Mr. Laverty testified (226):

> "Q Now, the drawings that you have identified as having been submitted to you and sent to National on March 30, were those drawings ever changed in any way?
>
> A As I mentioned in the memo, they were being gone through for slight modifications of the title, maybe a word or two, I don't know exactly.
>
> Q When did those changes take place?
>
> A After the 30th.
>
> Q After the 30th. Did there come a time when you received a second set of drawings?
>
> A Yes, Sir.
>
> Q When was that?
>
> A That would be on the 4th."

Mr. Voorneveld testified (311-312):

> "Q Now, do you recall if there were any changes made to the March 30th drawing or subsequent to this time?
>
> A Yes, very minor. One change we had, we had some clothes line. And another change, we had to change a detail with footing of a slab. And another

change was some lettering. Another change was additional couple of play yards. Very minor changes, but there were changes.

Q I show you Plaintiff's Exhibit 16 and ask you if these are revision drawings that were subsequent to March 30th?

A Yes, sir, they are.

Q Were you aware that National was using or would be using the March 30th drawings in order to solicit prices from the subcontractors?

A Yes, sir.

Q Would any of these changes in the April 4th drawings have had any effect on the pricing?

A No, sir."

Mr. Voorneveld then, standing at a table in the courtroom, laboriously examined each page in both twenty-page sets of plans and testified that any differences were minor. (333-337)

The fact is that the testimony of plaintiff's witnesses as to the extent of the changes incorporated into the April 5 plans was untrue. The nature of the changes actually made in the first six pages of the two sets of plans is detailed in National's main brief (Nat. Br. 21-22) and will not be repeated here. Voorneveld, in fact, conceded on rebuttal that Gleason was right as to many of the changes Gleason had pointed out and Voorneveld had overlooked in his direct testimony. (673-674; 676-677) Whether Messrs. Laverty and Voorneveld deliberately lied under oath or honestly did not appreciate the nature of the changes that were made is not the issue and no purpose is served by attributing bad faith to them. But, clearly National was entitled to refute the testimony by showing the nature and the extent of the changes that were actually incorporated into each of the

twenty pages of the April 5 plans and such evidence could not be restricted (as plaintiff contends) to the question of the credibility of any witness. Such evidence was not only relevant but crucial to National's case and had nothing whatsoever to do with whether any plans met the Navy's specifications. It went solely to the question of *when* were the *final* plans submitted.

Plaintiff's brief completely fails to address the issue of the exclusion of evidence relating to whether the March 30 plans were final plans. Plaintiff does not even mention the question of timeliness as an issue. (Br. 1-3) When plaintiff finally deigns to address the preclusion of Mr. Gleason's testimony, it merely says that since the evidence went only to impeach Mr. Voorneveld's testimony, it was within the discretion of the trial court to exclude it because its prejudice outweighed its probative value. (Br. 31-32) In an action in which the timeliness of plaintiff's submission was conceded to be an essential issue, the failure of plaintiff to address that issue squarely is shocking.

Indeed, even if the evidence on the differences in the plans was admissible solely to impeach Voorneveld's credibility (as plaintiff conceded), it was an abuse of discretion to preclude National from showing that Voorneveld was incredible as to the last fourteen pages of the plans as well as the first six. The fact is that the evidence then coming in was so devastating to plaintiff's case on the issue of timeliness that plaintiff adroitly sought to extend the Court's ruling on adequacy, and succeeded. Plaintiff led the Court into error, which should now be corrected.

Plaintiff's attempt to justify the exclusion of the notes prepared by Michael Bolka and the Court's limitations of Bolka's testimony is also without merit. Plaintiff attempts to urge on this Court the same specious reasoning that it urged below, namely that the jury *might* believe that the evidence related to the inadequacy of plaintiff's final plans. (Br. 35) The testimony could not have been any clearer

on the fact that Bolka had not even seen either the March 30 or April 5 plans when he made his notes as to his visit to South Carolina. The only plans that he had with him were the March 6 preliminary plans that had been drafted over a month prior. (583-584)

National declined to stipulate that the Bolka notes and testimony did not refer to either the March 30 or April 5 plans because such a stipulation was not necessary. The witness had testified that he did not have either set of plans with him in South Carolina and did not know that the March 30 plans even existed. Yet, on the basis of the witness's inability to answer the convoluted question of plaintiff's counsel as to whether his testimony related or had any bearing "in any way, shape or form" (591) on the March 30 or April 5 plans, plaintiff argues that the vast part of the Bolka notes was properly excluded. (Br. 34)

Plaintiff urged and the Court accepted the argument that all except the first item of the Bolka notes were inadmissible because they referred to matters not mentioned in National's answers to interrogatories. As is set forth below (Point II), it is plain error to exclude evidence under a claim that it varies from interrogatory answers. However, Bolka's notes in no way contradicted any answers to interrogatories. The interrogatory at issue inquires as to the reasons for National's decision not to submit a bid. Among the reasons given were problems with "soil conditions" and "the inability to get bids from subcontractors for necessary land improvement work". (25) Bolka testified that his sole purpose in going to South Carolina was to obtain bids from subcontractors for land improvement work. (577-579) Each of the eight separate areas covered by his memo related directly to land improvement work and the problems that he was having in obtaining even preliminary commitments from subcontractors. (Ex. K, 785; 786) The areas covered by the memo were: (1) excavation, (2) streets, (3) sidewalks, (4) storm drain-

age, (5) sanitary sewer, (6) water system, (7) gas distribution system and (8) landscaping.

Plaintiff urges that the jury might have become confused and have believed that the references in the Bolka notes to what were admittedly the preliminary plans drafted by plaintiff on March 6 were somehow the March 30 or April 5 plans. (Br. 33) Such a contention is totally without substance. Moreover, no such assertion can be made with respect to the exclusion of Bolka's testimony as to whether he was able to obtain bids from the various subcontractors that he had contacted (600-603), and there can be no dispute that the inability to obtain bids from such subcontractors was one of the matters referred to in National's answers to interrogatories.

Although National was precluded from showing that final plans were not submitted in a timely manner, that every effort had been made to submit a proposal, and that National had advised plaintiff of the problems being incurred (443-444), plaintiff argues that National "inexplicably" failed to submit a bid after timely final plans were submitted to it. (Br. 4) Plaintiff claims that although the parties were in telephone contact right up to the time for the submission of a bid, National never informed plaintiff that there was a problem concerning any plans. (Br. 20-21) Plaintiff states to this Court, "if there was something wrong with Wiedersum's plans, why didn't someone from National say so? Why didn't Mr. Payne or Mr. Gleason say so during the telephone discussions with Laverty and Voorneveld the week of April 2nd?" (Br. 22) The record shows that plaintiff's argument is disingenuous. Gleason was prevented by plaintiff's objections and motion to strike from testifying that Gleason had pointed out National's problems in the March 30 plans to Mr. Laverty (443-444):

> "Q [by Mr. Simmons] I believe you testified that you had a conversation with Mr. Laverty; is that right?
>
> A That's correct.

Q What did Mr. Laverty say to you in that conversation?

A When discrepancies were brought to his attention on the early part of the bid week, at which time—

MR. MORRISON: Objection.

I don't know what date he's referring to. He said a conversation.

Q On what date did you speak with Mr. Laverty?

A The early part of the bid week. It would probably be on a Tuesday.

Whatever the date, it would be on a Tuesday.

Q What did Mr. Laverty say to you?

A He was advised of the discrepancies, the changes that would have to be—

Q I asked you what he said to you.

A He said that he would make the —

MR. MORRISON: Please. I have an objection.

I ask that that answer be stricken on the same grounds as before.

THE COURT: Same ruling [*i.e.*, objection sustained and testimony stricken]."

It is hard to imagine a more prejudicial state of affairs. Plaintiff precluded National from introducing clearly relevant testimony. Now plaintiff argues to this Court that National would have presented such testimony if it existed. Since none of the testimony excluded had anything to do with whether the April 5 final plans were inadequate, the "[s]ame ruling" of the Court below was clearly erroneous.

II.

The Adequacy of Final Plans was not an Affirmative Defense.

Rather than analyzing the claims asserted at trial, plaintiff's brief merely asserts over and over that the adequacy of final plans was an affirmative defense, as if by repetition plaintiff could make it so. An examination of plaintiff's contentions clearly shows that it was an essential element of plaintiff's case to establish that it was injured by the failure of National to submit a bid for the South Carolina project. Plaintiff claimed that had it not been for the failure of National to submit a bid, a contract would very likely have been awarded by the Navy on the basis of the plans drafted by plaintiff and, therefore, it was damaged by National's actions which were the sole cause for plaintiff's not being in contention.

Obviously, if the Navy never would have awarded a contract based on the final plans submitted by plaintiff then plaintiff cannot claim to have been damaged *but for* the action of National. Plaintiff offered evidence that the bid submitted by plaintiff and National for the Warminster project came in second to that of the successful bidder on that project. (Ex. 2, 763; 174-176) The only purpose for which that evidence was offered was to show how close plaintiff's plans had come before, that plaintiff would have been in contention for the South Carolina Project, and that plaintiff was injured by the fact that a bid was not submitted. Indeed, although plaintiff withdrew the claim on the eve of trial, the complaint alleged that a contract would have been awarded by the Navy on the plans drafted by plaintiff. (Complaint ¶ 19(12)) Since plaintiff submitted such evidence and claimed that but for National's actions it would have reaped a substantial profit, National was entitled to show that plaintiff was not damaged by National's failure to submit a bid because plaintiff's plans were so insufficient under the Navy's require-

ments as to remove any chance of plaintiff's plans being selected by the Navy. A failure of consideration, which Rule 8(c) requires to be pleaded as an affirmative defense, is in no way involved. It is not National's contention that it was not obligated to submit a bid because it did not receive what it bargained for. The evidence with respect to the adequacy of plaintiff's plans goes solely to the question of whether or not plaintiff was damaged in any way by National's actions, and that evidence negated a basic element of plaintiff's cause of action.

The authorities cited in National's principal brief (Nat. Br. 30-31) show that evidence which negates an essential element of a plaintiff's cause of action cannot be precluded on the grounds that it would also have been admissible under an unpleaded affirmative defense. Plaintiff makes no attempt to contradict or explain those authorities. Rather it cites (Br. 26-27) *Dorsey & Co.* v. *Banque Nat'l de la Republic D'Haiti,* 393 F. Supp. 893 (S.D.N.Y. 1975), which is clearly not on point. The evidence offered in that case did not relate to an element of the plaintiff's case but rather went to whether the defendant could submit evidence as to an unpleaded affirmative defense under cover of another affirmative defense that had been pleaded but rejected by the court.

Assume for the sake of argument that a bid had been prepared for submission but did not go in because the party ("Carrier") with whom plaintiff had contracted for transportation of the plans to the Navy at Charleston had for some reason breached its contract with plaintiff and not delivered the plans. Assume, further, that it was clearly established that this constituted a breach of the contract between plaintiff and Carrier. Would plaintiff in that situation be entitled to claim damages against Carrier of $150,000 or $250,000 without some showing as to how plaintiff was entitled to reap such a bonanza? The answer is obviously no. Plaintiff would have had to show how it could have received the $250,000 or have been in con-

tention for it. Any evidence as to the failure of the final plans to meet the Navy criteria, which would have resulted in rejection of the plans out of hand by the Navy, is not a failure of consideration but shows that plaintiff was not damaged by any breach of duty by National. The situation in the present case is no different from the hypothetical. The evidence on adequacy of the plans had nothing whatsoever to do with whether National was excused from performing a claimed contractual duty by failure of consideration, and National never so argued.

Plaintiff's response is that adequacy did not relate to damages, admittedly an essential element of its case, because it would then have been required to go through each and every page of the specifications and prove that the plans were in compliance with the requirements set forth therein. (Br. 29) Such a contention is totally without merit. For example, plaintiff did not attempt to show that the April 5 plans were identical to the March 30 plans by analyzing each and every facet of the plans; rather, it had its witnesses testify that the plans were the same except for some "very minor" changes. It was then National's right to explore the details to show how they differed. The situation with respect to adequacy would be no different, because it would be National's burden and right to dispute the contention that the plans satisfied the Navy's criteria by showing how they were deficient.

Plaintiff's contention that National was precluded from submitting evidence as to the adequacy of the final plans because adequacy was not mentioned in an answer to an interrogatory as a reason for National's decision not to submit a bid is a red herring. No one disputes plaintiff's claim that interrogatories are designed to enable a party to know what evidence it will have to meet at trial. If a party introduces evidence which varies from its answers to interrogatories, the remedy is to allow the answers to be admitted as an admission and for any discrepancy to be submitted to the jury as an inconsistency undermining the

answering party's credibility, as is stated in the cases set forth in National's principal brief. (Nat. Br. 19) There is absolutely no basis for precluding the answering party from submitting at trial evidence varying from its interrogatory answers, and plaintiff has submitted no authority to the contrary.

The fact is that National's answers were not inaccurate. The reference in National's trial memorandum, which plaintiff claims was the first hint that it had as to the claimed insufficiency of its final plans, read as follows:

> "Eight sets of final plans did arrive on April 5, 1973 with a letter from plaintiff dated April 4. This was much too late to gather the necessary cost data. Subsequent review of these plans by defendant revealed that even had they been received eight or ten days prior to April 6, they contained so many deficiencies that no responsible bid could have been submitted without substantial revision of the plans. For instance, net area shown on the plans exceeded the net area prescribed in the Navy's criteria by approximately 15%. The floor plans for the units were not complete. Some side elevation plans did not match floor plans. No foundation sections were shown for each type of building. No street sizes or other details were given."*

Clearly, it was National's contention that the April 5 plans were insufficient and that it was only after a subsequent review of them that the many other deficiencies were discovered. Yet, John Gleason, who is conceded to have been the individual who made the decision not to submit a bid, testified that the decision was made late on the afternoon of April 4 (538-539), *prior* to the arrival of the April 5 plans. If plaintiff wanted to argue to the jury the slight discrepancy between the interrogatory answer, which was

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* Plaintiff's claim (Br. 30) that National did not review the April 5 plans until the evening prior to Gleason's testimony is belied by the prior recitation in National's trial memorandum concerning the deficiencies of the April 5 plans.

made on the best information then available to National, that the decision was made "on or about April 2, 1973", that was plaintiff's right. But it cannot be disputed that the decision was made prior to the arrival of the April 5 plans which were subsequently discovered to be deficient. Obviously, the reasons for National's decision on April 4 could not relate to deficiencies in plans submitted to it on the following day.

Indeed, in the context of the parties working together to submit a bid, it is meaningless to speak of a decision not to submit a bid because of the inadequacy of plans. There is no such thing as inadequate plans as long as there is time to correct the deficiencies. This was not a situation in which plaintiff was given one shot at drafting adequate plans, with a decision being made not to submit a bid if the first attempt was not perfect. The decision not to submit a bid was based on the fact that time ran out and that was most certainly disclosed as a reason for the decision in National's answers to interrogatories.

III.

Promissory Estoppel Cannot Be Applied to a Claim that is Essentially for Breach of Contract.

The argument advanced by plaintiff that it was entitled to a charge based on promissory estoppel in a breach of contract action is based on a misinterpretation of the case law. Plaintiff cites (Br. 39-40) *Bethlehem Fabricators, Inc.* v. *British Overseas Airways Corp.*, 434 F.2d 840 (2d Cir. 1970); *Spiegel* v. *Metropolitan Life Ins. Co.*, 6 N.Y. 2d 91 (1959); and *Siegel* v. *Spear & Co.*, 234 N.Y. 479 (1923) as rejecting the restriction of promissory estoppel to charitable subscriptions and insurance cases. On the contrary, a reading of those cases shows clearly that the doctrine is not applicable to breach of contract actions of a commercial nature.

The Court in *Bethlehem Fabricators* cited *Siegel* v. *Spear & Co.* and *Spiegel* v. *Metropolitan Life Ins. Co.* as examples of insurance cases to which promissory estoppel has been restricted by the New York courts. The Court goes on to say, as is shown in the language quoted from the opinion in plaintiff's brief (Br. 40), and in National's main brief (Nat. Br. 38), that it was allowing recovery by the plaintiff because the consequences of defendant's failure to perform its promise were "potentially as severe as were the consequences in the insurance cases [*Spiegel* v. *Metropolitan Life Ins. Co.* and *Siegel* v. *Spear & Co.* among others]". (434 F.2d at 844) The promise there that was not performed was that a surety bond would be obtained to insure payment to plaintiff, a subcontractor, in the event that the general contractor defaulted in making payment. Obviously, *Bethlehem Fabricators* is, in essence, an insurance case and in no way supports the proposition that a party, such as plaintiff, can rely on promissory estoppel in the event that it is unable to establish its claim for breach of contract. If promissory estoppel were applied as plaintiff contends, the requirement of consideration and the other elements for a breach of contract action would be totally meaningless. See *James Baird Co.* v. *Gimbel Brothers, Inc.*, 64 F.2d 344 (2d Cir. 1933).

Plaintiff further argues that the charge of the Court—that an agreement was shown if defendant's actions led plaintiff to believe a bid would be submitted—was proper because National does not point to any evidence to show that it ever asserted a "right to make a unilateral, last-minute decision not to bid". (Br. 36) That is true because the evidence showed that the parties never discussed whether National was precluded from refusing to bid simply because plaintiff drafted something that plaintiff characterized as final plans. (327-328; 482-483) Clearly, both parties were relying on the fact that neither stood to gain anything unless a bid was submitted. No one even raised the question of whether plaintiff could decide that

it did not want to complete the process of drafting plans or whether National could decide that it was no longer interested in constructing a massive facility such as the South Carolina project, which it would have been obligated to do if a bid had been submitted and the Navy had awarded a contract. However, the claim that National never informed plaintiff that a bid might not be submitted misses the point as to the error of the Court in submitting a charge based on promissory estoppel.

The question is not whether National ever said it might not want to put in a bid. The issue is whether, even if plaintiff believed that a bid was to be submitted, that belief is sufficient to impose liability on National. The Court's charge indicated that it was sufficient (749), and that was error.

The cases cited by plaintiff to the effect that a party's conduct can be considered evidence of its contractual intention (Br. 39) are irrelevant to the question here presented. Of course, a party's conduct is evidence of its intention, contractual or otherwise. But that has nothing whatsoever to do with whether promissory estoppel can be used as a fallback position by a party in what is a commercial breach of contract action, in the event that it is otherwise unable to prove its claim.

IV.

Plaintiff's Argument Shows that it was Error not to Submit the Complaint to the Jury.

As is apparent from the cases in National's main brief (Nat. Br. 31-34), the pleadings of a party are admissions which the jury is entitled to have submitted to it. Plaintiff attempts to support its argument that it would have been reversible error to submit the pleadings to the jury by citing (Br. 48) a line of cases that actually stand for the opposite proposition.

Plaintiff cites *Dzulvelis* v. *Mays Fur & Ready to Wear, Inc.*, 18 N.Y.S.2d 106 (App. Term, 2d Dep't 1939), in support of its argument. Actually, what the Court there held was that it was error, over defendant's objection, for the Court to allow plaintiff to submit the complaint to the jury. Obviously, a party's own pleading is not an admission and the Court's ruling that it was improper to allow such self-serving charges to go to the jury was quite proper.

Pescara v. *Hanson Chemists, Inc.*, 122 N.Y.S.2d 848 (App. Term, 1st Dep't 1953), was an action in which it was held that it was improper to allow a plaintiff to submit his own bill of particulars to the jury where the bill was not in evidence. Clearly, the submission of the bill of particulars was improper in two respects: (1) it was the party's own bill of particulars and not an admission, and (2) the bill of particulars was not in evidence. Here, National had requested the complaint be admitted in evidence. (667)

In *Roscoe Lumber Co.* v. *Standard Silica Co.*, 62 App. Div. 421 (2d Dep't 1901), the defendant asked plaintiff's president whether the matters stated in plaintiff's bill of particulars were accurate. Plaintiff then wanted the bill of particulars admitted into evidence, which the Court rejected in stating, "we know of no rule which would permit their [bill of particulars] admissions as against the party who did not make them". (62 App. Div. at 424)

Finally, in *Rubinstein* v. *Sark Co.*, 36 N.Y.S.2d 311 (City Ct. Queens Co. 1942), it was claimed that a jury verdict should be set aside because a court attendant refused to give the answer that was not admitted into evidence to the jury. The Court held that the reasons given by the jury for wanting the answer were insufficient to set aside the jury verdict in defendant's favor. The jury indicated that it wanted to use the answer to impeach the testimony of a non-party witness. The case offers no support to plaintiff's instant claim that it was proper for the Court

to refuse National's offer of the complaint into evidence as part of National's case.

Plaintiff further contends that it hinted that the pleading could be read into evidence. (Br. 48) National was not obligated to try its case pursuant to plaintiff's hints. Plaintiff's hint, in fact, undercuts its argument. If it were proper to read the complaint to the jury, it could not be improper to give them the document to read for themselves. Plaintiff makes no argument that there is any valid difference between the jury's hearing the complaint read and their reading it themselves.

The evidence was far from clear as to which plans were the final plans, the March 30 plans or the April 5 plans. National was entitled to have the jury look at the allegation in the complaint that the "final plans" were not sent to National until April 4. (Complaint ¶ 7 (10)) Plaintiff's reference "to its hints" only shows that it could claim no prejudice if the complaint had been submitted to the jury.

V.

National Was Prejudiced by the Court's Refusal to Inform Counsel of its Charge Prior to Summation.

Plaintiff claims that National was in no way prejudiced by the failure of the Court to inform counsel of its charge prior to summation as is required by Rule 51. First, plaintiff states that there was no doubt that the adequacy of the final plans was not at issue. On the contrary, the Court's ruling on that issue was so patently erroneous and the errors in the Court's other rulings, in which it misapplied its ruling on adequacy, were so pervasive that it was impossible to predict how the charge would be formulated. Indeed, one of the conflicting portions of the charge read as follows:

> "If you fail to find either that the plans were timely submitted *or that they did not meet the requirements*

> *of the Navy,* you must return a verdict in favor of defendant." (emphasis added) (754)

Although there may have been no doubt in plaintiff's mind as to what the charge would be, there was certainly doubt in the mind of National and that of the Court. Absent some certainty as to the charge on the law, it is impossible to present a cogent and convincing argument to the trier of the facts. That is why Rule 51 reads as it does.

Further, plaintiff argues that National could not have been prejudiced with respect to the failure of the Court to indicate its charge on promissory estoppel. Plaintiff claims that since the Court had not indicated its intention, plaintiff did not argue promissory estoppel to the jury and that the jury must have based its verdict on the existence of a contract. (Br. 50)

What plaintiff is saying is that plaintiff was not prejudiced. National, however, was severely prejudiced by the Court's failure to follow Rule 51. Since the Court did finally give an instruction on promissory estoppel (749), it is impossible to know on what basis the jury rendered its verdict. National had indicated in its trial memorandum that an instruction on promissory estoppel was inappropriate in what was in essence a commercial breach of contract action. (134-136) However, in the event that the Court disagreed, National had prepared and submitted a request that properly set forth the elements of promissory estoppel, so, obviously, National was prepared to argue on that issue to the jury in the event that the Court disagreed with National's initial position. But since National did not have the Court's charge prior to summation, National had to make a guess in the dark. Since it expected that the Court would follow what was clearly the law and not submit the issue of promissory estoppel to the jury, National did not argue promissory estoppel in summation. (689-713) Obviously, the Court's decision to charge the issue National had not argued was prejudicial to National.

VI.

The Failure to Object to the Conflicting and Irreconcilable Nature of the Charge Does Not Preclude Review.

It should first be noted that one of the purposes of the requirement of Rule 51 that counsel be informed of the Court's charge prior to summation is to afford counsel sufficient time to articulate objections and to help the Court avoid error. *Tyrill* v. *Alcoa Steamship Co.*, 185 F. Supp. 822, 824 (S.D.N.Y. 1960). The Court, having failed to do so, left the parties in the untenable position of having to field on the spot all of the errors and contradictions that were thrown their way by the Court in its charge.

The law is clear that the issue of a patently defective charge can be raised on appeal despite the fact that no objection was made. In *Johnson* v. *Erie Railroad Co.*, 236 F.2d 352 (2d Cir. 1956), the errors committed by the Court in its charge were nowhere near as pervasive as the errors committed in the present case. Yet, the Court held that the cumulative effect of the errors was "such as to make the possibility of confusion too great to disregard" (at 356), despite the fact that no objection had been made. Again, in *Ferrara* v. *Sheraton McAlpin Corp.*, 311 F.2d 294 (2d Cir. 1962), the question arose as to whether the failure to object to a patently erroneous charge was fatal. The Court there said:

> "Having determined that the trial court committed reversible error in the delivery of the charge, we are met with the contention that defendant is precluded from raising the point on appeal because of its failure below to make a timely and precise objection in compliance with Rule 51. Such failure on the part of an appellant, however, is not an absolute bar to an appellate court's consideration of the error on its own motion, particularly 'where it is apparent to the appellate court on the face of the record that a miscarriage

of justice may occur because counsel has not properly protected his client by timely objection.' " (311 F.2d at 297)

VII.

There was No Factual Basis for the Amount of the Jury Verdict.

Plaintiff argues that the amount of the jury verdict represented the reasonable value of its services and that such a verdict was proper under the Court's charge. However, the Court below was more specific with respect to damage than plaintiff's argument would indicate. While reference was made in the charge to the reasonable value of plaintiff's services, the Court also said:

> "A further necessary element of any recovery by plaintiff is damages in a certain amount. This element, too, must be proved by plaintiff by a preponderance of the evidence. In order for plaintiff to be awarded damages, the amount of the damages must be proven to a reasonable degree of certainty. The amount of damages cannot be left to speculation or conjecture. Plaintiff contends that as a result of wrongs by defendant it incurred various costs and expenses. You must be satisfied to a reasonable degree of certainty that plaintiff did in fact incur such costs and expenses and the amount incurred before such an amount can be awarded as damages." (754-755)

The cases cited by plaintiff indicate that, contrary to its argument, the amount of the jury's verdict was indeed speculative. In *Griffen* v. *Sprague Electric Co.*, 115 Fed. 749 (S.D.N.Y., 1902), cited by plaintiff (Br. 45), the Court said the following:

> "To permit him to spend his time and money on the expectation that the defendant would carry out the contract, when it had, without his consent or knowledge,

> so changed its circumstances that it could not do so, would seem, as a matter of law, to entitle him to recover *what it had falsely induced him to so lay out.*" (emphasis added.) (115 Fed. at 750)

In the present case, the only evidence submitted as to amounts plaintiff laid out was $6,556.02.

Plaintiff also places great reliance on *Hunter* v. *Vicario,* 146 App. Div. 93 (1st Dep't, 1911), which it claims to be identical to the present case. However, there the plaintiff recovered the reasonable value of its services on the theory of *quantum meruit.* No cause of action for *quantum meruit* was pleaded or argued in the present case. As plaintiff states, its causes of action were based on breach of contract and promissory estoppel. (Br. 4)

Quantum meruit is a cause of action that has its own distinct elements, among which are the requirement that the services be performed with the understanding by both parties that there is to be an obligation to pay for them. *Shapira* v. *United Medical Service, Inc.,* 15 N.Y.2d 200 (1965); *Grombach Productions, Inc.* v. *Waring,* 293 N.Y. 609 (1944); *Miller* v. *Schloss,* 218 N.Y. 400 (1916); *McGuire* v. *Hughes,* 207 N.Y. 516 (1913).

In *Miller* v. *Schloss, supra,* the Court said:

> "A *quasi* or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth it is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which *ex aequo et bono* belongs to another. Duty, and not a promise or agreement or intention of

> the person sought to be charged, defines it. It is fictitiously deemed contractual, in order to fit the cause of action to the contractual remedy." (218 N.Y. at 407)

Further, *quantum meruit* rests on the principle of unjust enrichment. For a defendant to be unjustly enriched, he must have received some benefit which he cannot in equity retain without making payment. Plaintiff, in drafting plans for the South Carolina Project, had no intention of benefiting defendant. Rather, plaintiff hoped that a successful bid might be submitted for which it would receive a considerable fee. It was for plaintiff's own benefit, and not the benefit of National, that plaintiff drafted the plans.

CONCLUSION

The judgment below should be reversed. A new trial should be ordered. In the alternative, the amount of the judgment should be reduced to $6,556.02.

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Respectfully submitted,

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